In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-304

RICHARD A. GORDON, ETC., PETITIONER

v.

NEW YORK STOCK EXCHANGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

The Securities and Exchange Commission files this memorandum to urge that the Court grant the petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit rendered in this case on June 28, 1974.

STATEMENT

Petitioner, Richard A. Gordon, brought this private antitrust action on April 2, 1971 against respondents New York Stock Exchange, Inc., American Stock Exchange, Inc. and two member firms of these exchanges, charging that the exchanges' fixed minimum commission rate systems violated the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Robinson-Patman Act, 15 U.S.C.

§ 13(a).[1] The suit, which petitioner instituted on his own behalf and for a purported class of "small investors," sought injunctive relief and treble damages of $1.5 billion. Petitioner specifically attacked exchange rules which (1) provided for a "volume discount" from the minimum commission rate for large transactions executed on the exchanges, (2) imposed an interim "surcharge" on the execution of "small transactions" of less than 1000 shares, and (3) authorized exchange members to negotiate the commission to be charged on that portion of a trnsaction in excess of $500,000 (now $300,000) while continuing to maintain a fixed minimum commission rate for smaller transactions. He also challenged rules of the exchanges imposing a limitation on exchange membership while prohibiting access of non-member brokers to exchange facilities at a discounted commission rate and forbidding members to share commission with non-members. These practices were alleged to constitute a system of price discrimination and a price-fixing conspiracy in contravention of the antitrust laws (Pet. App. 21-22, 37).

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[1]Respondents New York Stock Exchange, Inc. and American Stock Exchange, Inc. are national securites exchanges registered as such with the Commission pursuant to Section 6(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78f(d). Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Bache & Co., Inc. are member organizations of both exchanges and were sued individually as representatives of all member firms of these exchanges.

The district court, without considering the merits of petitioner's principal claims, granted summary judgment in respondent's favor and dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 21). Characterizing the action as "a broadside attack on the present commission structure of the Exchanges" (Pet. App. 22), it held that an antitrust court was without jurisdiction to entertain an attack on the fixing of commission rates by the exchanges on the ground that the practices complained of are within the "exclusive jurisdiction" of the Commission, that the Commission, acting pursuant to Section 19(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78s(b), has been actively regulating these practices, and that consequently, the practices are exempt from the provisions of the antitrust laws (Pet. App. 22). In reaching this determination, the court found that the fixing of commissions fell "squarely within the congressional policy of exchange self-regulation" which is subject to Commission supervision under Section 19(b) of the Exchange Act[2] (Pet. App.

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[2]Section 19(b) of the Exchange Act provides in pertinent part:

> The Commission is . . . authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as . . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges; . . . and (13) similar matters.

26). It concluded that where power to review particular exchange conduct has been vested in the Commission, effectuation of the policy of supervised self-regulation embodied in the Exchange Act requires displacement of judicial antitrust scrutiny in favor of the Commission's authority (Pet. App. 29). The district court therefore disagreed with the decision in *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F. 2d 264 (C.A. 7), certiorari denied, 401 U.S. 994, insofar as *Thill* has been read as holding "that an antitrust court has concurrent jurisdiction with the SEC over *all* potentially anti-competitive practices and rules . . ." of a national securities exchange (Pet. App. 26, 34).

On petitioner's appeal, the Commission and the Antitrust Division of the Department of Justice participated *amici curiae:* the Commission supporting the trial court's judgment, the Department of Justice urging reversal. The court of appeals affirmed, stating that the requisite reconciliation between the antitrust laws and the scheme of supervised exchange self-regulation embodied in the Exchange Act must begin with an analysis of this Court's decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341. It reasoned that in *Silver* the enforcement of an exchange rule was held subject to antitrust scrutiny because of the absence of Commission authority to review the particular exchange conduct involved, and that this Court acknowledged in *Silver* that "if there were Commission jurisdiction to review a challenged [exchange] rule, a different case would arise concerning antitrust exemption" (Pet. App. 36-38). The court of appeals concluded that it was presented with that "different case" since under Section 19(b)(9) of the Exchange Act supervisory authority

over the fixing of commission rates is expressly vested in the Commission (Pet. App. 41). Stating that the exercise of antitrust jurisdiction in *Silver* was deemed proper because, in the absence of Commission review, assertion of judicial oversight would not result in conflict "between agency and court" (Pet. App. 39) and the denial of antitrust jurisdiction "would have left no governmental body to perform the antitrust function (*id.*), the court held that the existence of Commission review power in the instant case supported a finding of antitrust immunity for the challenged exchange practice of fixing commission rates (Pet. App. 40).

The court found additional support for its ruling concerning antitrust exemption. Referring to the test enunciated in *Silver* that repeal of the antitrust laws is to be implied only to the extent "necessary to make the Securities Exchange Act work," the court construed that test as necessarily contemplating a "core of exchange self-regulation necessary to make the 1934 Act work, and thus immune from application of the antitrust laws" (Pet. App. 41). From the language of Section 19(b) and the Exchange Act's legislative history, it determined that Congress defined in Section 19(b) those matters which it considered "fundamental to achieving 'the aims of the Securities Exchange Act' . . . and accorded the SEC authority to make whatever changes respecting those matters as are 'necessary or appropriate' . . . to effectuate those aims . . . ." (Pet. App. 41). It concluded that if this core of exchange self-regulation exempt from the antitrust laws is to have any meaning it must therefore "have reference to the practices enumerated in §19(b) and in this instance to the fixing of reasonable rates of commission" (Pet. App. 41). For, if the exchanges were subjected to "duplicative or inconsistent standards announced contemporaneously by

courts and Commission" the "inevitable consequence" would be to "render ineffective the supervised self-regulatory scheme designed to accomplish the aims of the Exchange Act" (Pet. App. 41).

Finally, the court of appeals – after observing that "it would be difficult to maintain" that the effect of the rule challenged in the *Thill* case is in any significant respect different from the practice of commission rate-fixing – stated that "to the extent our decision today is inconsistent with *Thill,* we find ourselves constrained to disagree with the holding there announced" (Pet. App. 49-50).

DISCUSSION

This case presents an important question involving the proper reconciliation between the Exchange Act's scheme of supervised exchange self-regulation and the antitrust laws with respect to exchange practices subject to the review jurisdiction of the Commission. The question of whether exchange practices subject to the Commission's supervisory authority, including the fixing of commission rates, are exempt from the operation of the antitrust laws directly affects the ability of the Commission and of national securities ecchanges to perform their regulatory functions and thereby effectuate the statutory purposes of investor protection, fair dealing in securities and fair administration of exchanges (Section 19(b)). Fulfillment of these aims, as Congress recognized, are vital to the maintenance of investor confidence in the capital markets of this country and to the continued economic viability of the securities industry. See Section 2 of the Exchange Act, 15 U.S.C. 78b. While the Commission believes the decision below is correct, there is a conflict between circuits regarding the proper application of *Silver* to exchange rules over which the Commission has regulatory jurisdiction. Review by this Court is warranted to set a uniform, national standard concerning antitrust exemption.

1. In *Silver,* this Court ruled that the antitrust laws are to be repealed to the extent necessary to make the Securities Exchange Act work. 373 U.S. at 357. However, neither *Silver*—which involved a particular instance of enforcement of exchange rules over which the Commission had no review jurisdiction—nor any subsequent decision by this Court has applied this guiding principle for reconciliation of the two statutory schemes to potentially anti-competitive rules of a national securities exchange that are within the supervisory jurisdiction of the Commission under Section 19(b). Since the challenged exchange practice of fixing minimum commission rates falls clearly within those matters enumerated in Section 19(b), the proper application of the *Silver* principle to this case is presented on this record.

2. The decision of the Court of Appeals for the Seventh Circuit in *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F. 2d 264, is in direct conflict with the decision below. In *Thill,* the court of appeals was presented with an antitrust challenge involving the New York Stock Exchange's former "anti-rebate rule"—a rule specifically intended to preserve the integrity of the exchange's fixed commission rate system by forbidding an exchange member from rebating to its customer or to a non-member broker any portion of the fixed commission. Thus, the anti-rebate rule was but an element of the fixed commission rate structure, would not have existed except in the context of such a rate structure, and clearly fell within the purview of the Commission's jurisdiction pursuant to Section 19(b)(9) and (13), 15 U.S.C. 78s-(b)(9) and (13). In contrast to the decision below, the *Thill* court held that "even the fact that the SEC

may be exercising its proper supervisory power over the rules of [a securities exchange] . . . does not in and of itself cloak [that exchange] . . . with antitrust immunity for its conduct relating to those rules." 433 F. 2d at 271. Rather "before a court may abdicate its jurisdiction on the antitrust issue the defendant [exchange] must establish its conduct as justified because it is necessary for the operation of the Securities [Exchange] Act." *Id.* at 273.

3. Resolution of the question of pre-emption of the antitrust laws in favor of the Commission's review power will have a material impact on the administration of the Exchange Act. If exchanges may be subject to antitrust liability for all conduct other than that which the Commission expressly directs, the willingness of exchanges to engage in self-regulatory activity will be substantially diminished. Similarly, the application of the antitrust laws to exchange rules within the Commission's Section 19(b) jurisdiction will necessarily affect the manner in which the Commission exercises its supervisory authority over national securities exchanges, not just with respect to stock exchange commission rates, but also as to the entire range of exchange activities made subject to its authority. The possibility of conflicting decrees by antitrust courts concerning self-regulatory activity subject to Commission supervision will necessarily limit the Commission's ability to formulate and effectuate a cohesive regulatory policy for the securities industry.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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I authorize the filing of the foregoing memorandum.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.